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THE IMPORTANCE OF JUDICIAL ADMINISTRATION TO THE PROTECTION OF THE INNOCENT, THE PUNISHMENT OF THE GUILTY, THE DEFENCE OF PROPERTY AND PERSONAL RIGHTS, AND THE JUST MAINTENANCE OF CONSTITUTIONAL GOVERNMENT. ILLUSTRATIONS DRAWN FROM ENGLISH CONSTITUTIONAL HISTORY AND THE COMMON LAW, AS WELL AS RECENT TRIALS IN WESTMINSTER HALL AND OTHER PORTIONS OF THE UNITED KINGDOM.

THE administration of justice, in all countries, and at all times, is a subject broad and difficult, both in its operation and its influence. It is perhaps more indicative, a truer test, of the real temper and spirit, both of the government and the people of the state or country, than any other one thing. This is especially true in regard to the administration of criminal justice, where the court is called to hold the scale of justice impartially between the state and the accused; or, what is sometimes more difficult, between the government or different factions or parties, for the time holding the administrative functions of the government, and the people at large. And this difficulty is greatly enhanced where offences against the government are concerned; especially in monarchical governments or states; and more so as those monarchies partake more of the absolute or despotic character. It may there well be supposed, that where the judge holds office at the mere will of the sovereign, and is liable at any moment, upon the slightest occasion, or none at all, to be removed

in disgrace, and thus have both the source of present support and future acquisition removed, in such cases it may well be supposed that the judge will almost necessarily merely echo the will or the desire of the sovereign, and that justice will be very little regarded. Hence very little fairness or purity is expected in countries under despotic rule, from the administration of justice, where the will of the sovereign is placed in the scale against the rights, either of individuals or of the people at large. This is a proposition so obvious as to meet no general denial or question. If any case occurs where fairness and firmness are exhibited in the courts of such a country, in opposition to the influence or the interests of the sovereign, it will be the more admired and praised, but none the less regarded as exceptional, and not to be counted upon in the general estimate of consequences and results.

Now this spirit, it must be remembered, is not peculiar to despotic governments, for it is natural and almost necessary that all governments and all parties having for the time the possession of administrative functions, should desire to have the courts favorably inclined towards themselves. And this being so, all governments and all governing parties will study to make and to keep the judicial administration favorable to their own views, and will consequently endeavor to frown down or put down all opposing views in the courts. This will be done in different countries and at different times in ways differing materially from each other; but in all cases with the same purpose of controlling and thus virtually corrupting the purity and independence of the judicial administration. And so far as we have observed, this is none the less true in republics than in monarchies. It is a thing to be expected everywhere alike. And it is not a thing which one can fairly consider as within certain reasonable limits. If we concede the same good faith to others which we all claim for ourselves, we must expect governments and parties, who believe in the soundness or the wisdom of their own policies, to labor to place themselves and their friends and the doctrines and constructions for which they contend upon the high vantage-ground of universal recognition and acceptance. To expect anything less would be to impeach either the good faith, the courage, or the zeal of the parties concerned.

Thus it will occur in more despotic governments, as for centuries in the history of the British monarchy, and even at the

present time in many European states, whose governments are, upon the whole, wisely and beneficially administered, that the judges will be removed or removable at the mere arbitrary will of the sovereign. And equally, in such governments, the sovereigns—as did the British monarchs until the accession of William and Mary, after the Revolution of 1688—will claim and exercise, at will, the power to suspend the operation of any law, written or unwritten, so long as to them shall seem for the interest of the state. These are the usual prerogatives of arbitrary and despotic empires, without which they would cease to be such.

Now, it must be remembered that these defects in governmental, and especially judicial, administrators, are not peculiar to despotic empires or states, and certainly not confined to governments of any particular organization. The short experience of our own happy and prosperous country, whose government is free and popular beyond all former precedent, is not without some lessons of loud admonition in this same direction. The courts, which at first were very generally modelled upon the independent structure and tenure of office of the English courts since the Revolution of 1688, have been gradually receding from that independent position, until, at the present day, there is scarcely one state in the Union where that character extends to all its judicial tribunals. In Massachusetts, for the security as well as the credit of that ancient and honorable commonwealth, the courts and the profession of the law have succeeded in pacifying the politicians and the legislature for the time being with the rather plausible theory that the Supreme Judicial Court, being the highest judicial tribunal in the state, is so embalmed or embedded in the constitution, that its soundness cannot be violated by any profane legislative hands. And this is all which could be saved from legislative demolition. And in order to secure even that last fortress of protection and defence against the rashness and delusions of popular prejudice or passion or fury of any kind, they have been compelled to adopt the suicidal policy of compromise by throwing a tub to the whale, as it has been sometimes called. In order to pacify the insatiable demands of popular ferment and political or legislative aspiration for advancement or progress, sometimes unjustly characterized as improvement, it has been found indispensable, even in this staid old common-

wealth, to concede that all the inferior tribunals whose judges held office by the same permanent tenure, *dum bene se gesserint;* that all those inferior tribunals whose judges numbered ten times as many as those of the Supreme Judicial Court, might be remodelled at the will of the legislature. And this has been literally accomplished within the last fifteen years, for no better object in fact than to change the names of the courts, and thus be enabled to appoint another set of judges, some of whom were younger men than their predecessors, and some were not; some of whom were better qualified to fill the places than those whom they succeeded, and some were not; but all were men in accord with the principles and the policies of the existing government.

Now it must be conceded that in thus volunteering to suggest that there is no difference in principle between the inferior and superior tribunals of a state, and that the Supreme Judicial Court of Massachusetts must put off its time-honored and venerable functions, and ere long consent to lie down in the same legislative sepulchre, thus prepared for all the subordinate tribunals of this noble old commonwealth, we feel not a little guilty of the offence of betraying our fellows, struggling manfully in the same honorable cause for the perpetuity of constitutional government. And we would fain hope there really may be more soundness in this, as it seems to us, rather shadowy distinction between the inviolability of the highest and the subordinate judicial tribunals of this commonwealth, than now occurs to us. But we all know, that in the neighboring state of New Hampshire, where the constitution, in regard to the tenure of the judicial office, is modelled carefully upon that of Massachusetts, the highest court in the state has had the same fate as all its subordinates, and has actually been remodelled by the legislature, not less than three times, within the memory of some now living, with no other purpose or pretence, than to change the name of the court, and thus get rid of the judges. So that in this state, where the tenure of office of the judges is, in terms, the same as in Massachusetts, or in England, *dum bene se gesserint*, the actual security from removal, upon any change in the ascendancy of political parties, is really less than in the neighboring state of Vermont, where the judges are elected annually by the legislature, and where, by immemorial usage, ripened into law, the judges are selected without reference to party, or political bias, and are continued indefinitely by a

formal re-election, unless some cogent reasons exist, demanding some change, in regard to which all parties are agreed. Thus showing very satisfactorily, that the actual facility of change, in popular governments, sometimes actually conduces to the stability of the judiciary, while the opposite not unfrequently begets a popular distrust and uneasiness, not so much on account of existing evils, as of those apprehended in the future.

But having said so much in regard to the manifest disposition among the American states to reduce the tenure of judicial office to a brief term of years, and in most cases to subject it to the test of popular elections, we feel bound to add, that it has not seemed to us, that this could fairly be laid to the account, chiefly, or to any considerable degree, of popular impulses or desires. The great mass of the people are, no doubt, deeply and vitally interested in having and maintaining, permanently, the ablest, most fearless, and independent judiciary, which the wisdom of man can devise. Wherever the appointment and the action of the judiciary has been brought near enough to the people to have them properly appreciate its importance, it has always been found, that a fearless and able judiciary was sufficiently safe in their hands. And although they do not readily volunteer to extend the term of judicial office, they are always content to let it remain where it is. It has always been found, hitherto, that movements in the different states, to limit the term or weaken the tenure of judicial office, have proceeded from those who hoped sometime to obtain the position themselves, or who desired the places as political capital, to distribute among their followers, or else dreaded the opposition or the control of an independent judiciary, as an obstacle to legislative and other reforms, in the municipal administration. With the exception of these three classes, there would never have been any difficulty in maintaining the perfectly independent tenure of judicial office in all those states where it was first adopted. The interests of a permanent judiciary have been betrayed, by political demagogues and time-serving placemen, and not by the people at large.

And, sooner or later, it is very obvious that the American States will have to consider the question of the indispensable necessity of an able and independent judiciary, in order to the proper maintenance of constitutional government. That was first secured after a struggle of many hundreds of years, in the British

Government, at the period of the Revolution of 1688. And from that day to this it has proved the mightiest bulwark of the British constitutional government. We do not here refer, of course, to any written constitution, for, aside from some few ancient charters, the Magna Charta, the Petition of Right, and the Bill of Rights, there is, as every student in the history of British constitutional law must know, no such thing as a written constitution in the British Empire. But it is none the less a constitutional government, and one based upon well-settled and recognised principles, and principles lying at the very foundation of all the American constitutions. There is no guarantee of constitutional freedom in America which is not, as every well-read lawyer knows, extracted from the common law of our British ancestors. And one cannot enter the superior courts in Westminster Hall, or Lincoln's Inn, and not feel that the character and temper, the wisdom and forbearance, of the English judiciary has very much to do with the quiet and good order of this little island. At the very moment of this writing, there is wide-spread evidence of discontent among large masses of people, not only in Ireland, but in England. We have not only Fenianism in Ireland, which is in its demands and pretensions the most absurd and hopeless thing imaginable, as dreamy and unsubstantial as the Entertainments of the Arabian Nights; but at the same time a *bonâ fide* and serious disturbance, and one calling for the exercise of great wisdom and forbearance, not only in the executive government, but in the judiciary; not only this, but there is the serious disturbance at Manchester, the actual assassination of the police in open day, and the attempted or threatened assassination of the police in other cities; the conflicts and repeated murders growing out of trades unions and labor strikes, and the disaffection existing in Devonshire and Oxford, and possibly in other portions of the island, in regard to low wages and the high price of bread. All this, and much else, which might be fairly named as indicative of discontent, more or less serious or extensive, might well be supposed to demand the wisdom and the energy of the ablest and wisest administration, both civil and judicial.

But all this, and ten times more, if it should occur, will scarcely produce a ripple upon the surface of the civil administration. Not that there are not some discontented spirits. There will always be men enough, in all states, and under all social or poli-

tical organizations, who would be glad to secure a redistribution of property; and there will be found, in all free governments, some men, in the better conditions of life, who have no desire on their own account to effect any such redistribution of estates, but who will, either from over-sympathy with the sufferings and distress of the poorer classes, and from not sufficiently reflecting upon the incurable nature of these difficulties; or else from want of comprehension, or indifference to consequences, or, what is still more reckless and desperate, from the desire of popular favor and influence, will give more or less countenance to these impracticable demands. We have had experience of this, from leading men, both in Parliament and in Congress, within the last twelve months—and from men of high standing and unquestionable patriotism, in both countries, in the advocacy of what, in plain English, really amounts to a redistribution of property——if it has any sensible meaning.

But, amid all this, and any amount of ordinary lawlessness and disturbance in this great Babel of cities, the largest and almost the wickedest, and really the least arbitrarily governed of any great city in the world, with the hundred other cities and large towns in the little island of Great Britain, scarcely more than five hundred miles in extent, what could be accomplished, with such universal freedom, and such unquestionable exemption from all arbitrary exercise of power, either by the general executive officers or the police of the towns and cities, except by a judicial administration, above all possible doubt or question; and one which the people felt to be their best friend and surest defence? What security exists for rights of property or person except in the judiciary? The legislature, in all times of disturbance, will be the first to propose the concession of part which is demanded, and thus by degrees yield the whole.

In a short visit to the courts at Westminster Hall, for two days in succession, this fact was deeply impressed upon us. We there saw, indeed, men of ordinary human infirmity, with passions and prejudices no doubt such as fall to the common lot, sitting in their ancient places, which had come down from the creation of the Aula Regis, dating back almost to the period of the Norman conquest; but men who felt the support of the prestige and the traditions of eight hundred years to back them; men who had all their lives witnessed the field of Runnymead, where

the Magna Charta of English liberty was signed and sealed by King John and the English barons; who had looked upon, and read, and pondered, the original instrument, for fifty years; who knew every word of it, and all its commentaries and amendments by heart; and, above all, men who had imbibed, with their earliest mental culture, the sense of the soundness of British law, and the rights of British subjects; a thing to earn and settle which had cost centuries of toil, and treasure and blood too; upon which no price could be placed by any man not base enough to become a slave himself.

With such men for judges, holding office beyond the limit of all earthly control, unless forfeited by crime, which no honest man ever takes into any account, in estimating the security of his possessions, what temptation was there to know any man's person in judgment, or to feel any interest, or influence, beyond that of simple justice? It is impossible to witness an argument before any of the Courts in banc, in Westminster Hall, and not feel that the judges, the counsel on both sides, and the parties, if present, which seldom is the case, as well as the bystanders, who are often very numerous, are all striving, consciously and quietly, towards one result, to find out, in the shortest way and time, the exact truth and justice of the case. So that, if the presiding judge, or, what is often the case, all the judges in succession, interpose ever so formidable objections, there is no fluttering among the counsel at meeting unexpected difficulties, and no feeling of disappointment among the judges at having objections satisfactorily and conclusively answered. There seems to be no pride of opinion among the judges, no unwillingness to yield a first impression or intimation, but rather, on the contrary, a feeling of satisfaction, if that were wrong, to have it corrected.

In short, one cannot spend an hour in one of these courts, and not feel that the courts are far more the courts of the people than of any other interest. Not that the interests of influential parties are any less regarded or respected than those of inferior standing; but from the natural presumption, that parties of means and position will be likely to be more carefully investigated and thoroughly argued, than those who are less expensively represented, it will always become the duty of upright and impartial judges, to look carefully to the protection of the rights and interests of those who have no one else to look after them. This was

wonderfully illustrated in the late trials, under special commission, both at Manchester and in Dublin. In both these cases the accused were arraigned for alleged crimes aimed most directly at the quiet and good order of society, in one case a treasonable conspiracy against the government, extending through a very considerable number of disaffected persons, and in the other, the deliberate assassination of one of the police in open day, and in cool blood, for the avowed purpose of rescuing a prisoner in acknowledged lawful custody! But in all the trials, before both these commissions, the deliberation and watchfulness of the judges, to reach the exact truth in all the cases, was so marked and undisputed, that no prisoner was heard to utter the least complaint, in regard to the fairness and justice of his trial. And in the case of those prisoners who chose not to be defended by counsel, the judges literally performed the constructive duty assigned by the common law of supplying the counsel for the prisoners, in making repeated suggestions to the prisoner to make inquiry favoring his defence. He abstained from such as seemed tending in the opposite direction. And then the summing up of the judges, in all these cases, was so entirely fair and full, in bringing out all the just grounds of defence on the part of the prisoners, that it was well characterized by some of the journals, as "a summing up for an acquittal." And still there was no attempt to impeach, or bring in question, on the part of any one, the entire propriety of this watchfulness of the judges to secure an impartial trial for all the prisoners. It seems to be comprehended here, that the only sure way to convict a guilty man before a jury, is to give him all possible chance of acquittal.

And during the present week, in the Court of Common Pleas, before Lord Chief Justice BOVILL and his associates, the hearing of a motion on the part of the somewhat notorious Miss Fray was well calculated to test the patience and forbearance of the English Bench in regard to troublesome suitors who choose to urge their own claims personally before the court, and thus verify the maxim in regard to parties who become their own counsel. This lady had been long in controversy before the court, all the time conducting her own case, until she was fairly thrown in the cause, and judgment was irrevocably given against her; when, instead of paying the same at once, she delayed until the *capias ad satisfaciendum* was placed in the hands of the sheriff's officer and she

committed to prison, and then tendered the amount of the payment and less fees than were due to the solicitors. They naturally demanded the entire sum due, as every lawyer understands was their right. But Miss Fray, knowing nothing of the law on this point, which had been settled for fifty years, chose to argue the matter *de novo* as *res integra*, and on a motion for a rule to strike the attorney's name off the roll, and was very patiently heard to the end. And then, because the court could not adopt her view, threatened the Lord Chief Justice to bring the case before the King's Bench in error. All which was received with the utmost quiet and equanimity by his lordship, without the slightest attempt to be witty at the expense of the good lady, or once looking at the bar over his shoulder to learn whether they commiserated his melancholy condition.[1] And the same, and more,

[1] The Times report of the case, although omitting the *finale*, may be interesting :—

After several practice motions had been disposed of, Miss Fray rose to make another motion in

FRAY *v.* OVENS.

In this case, which was an action to obtain possession of some documents, brought by Miss Fray, the defendant had a verdict, and the taxed costs against Miss Fray amounted to 24*l.* 8*s.* 8*d.* The attorney's bill not being paid, a writ of *capias ad satisfaciendum* was issued against her on the judgment, and she was taken in execution by the sheriff's officers, and complained of many indignities having been put upon her by the officers and others. She moved on affidavits to strike Mr. Sadleir, the attorney for the defendant in the action, off the rolls of attorneys, on the ground that he had conspired with others to use the process of the court oppressively to injure her, and had refused to accept a tender of the amount of the bill, and 1*l.* 5*s.*, sheriff's poundage, which she contended was all that could be claimed, whereby she had been subjected to the indignities of which she complained, had been kept some time in prison, and had been put to expense. It appeared, on going through the figures which the sheriff's officers were entitled to for execution and poundage, that the total amount of the costs and execution was 27*l.* 0*s.* 2*d.* On this appearing, in the course of a long and rambling statement,

Mr. Justice WILLES said he did not see that Mr. Sadleir or the sheriff's officers were wrong in not accepting the tender she had made and refusing her discharge. She had not tendered what was due. It appeared to him, therefore, that no case was made out for the interference of the court. Miss Fray was mistaken in supposing that the court had power to grant a rule to strike an attorney off the roll on general statements. There must be some specific charge made out against the attorney as an officer of the court before the court could interfere. Taking the affidavits in the most favorable sense for Miss Fray's application, the tender was less than the amount payable; the court could not, therefore, grant the rule to

might be said of the forbearing manner in which the somewhat famous Mrs. Yelverton was treated by the House of Lords a few months since in arguing an appeal in her own favor brought from the decree of the Court of Sessions in Scotland. Lord CRANWORTH, who presided at the trial in the absence of the Lord Chancellor CHELMSFORD, manifested a degree of indulgence almost calculated to encourage irregularity, not to use any more expressive language, which would be, perhaps, fairly justified by the wonderful pertinacity and want of accommodation manifested by the good lady during the trial.

We have extended this paper further than we intended, but not further than seemed needful to illustrate our point, that the more truly independent the judges are made, the more securely will the courts become an asylum and a defence for the innocent, and the more willingly will the people acquiesce in the conviction and punishment of the guilty. And we desired, also, to bring prominently before the profession and the public the vital truth, that the only reliable security for all property or personal rights and interests rests in an impartial and fearless administration of public and private justice; and that the just principles of free constitutional government, of which we are all so justly proud in America, cannot stand secure for all time upon any other basis.

I. F. R.

LONDON, November 10th, 1867.

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strike the attorney off the roll for refusing to take the proper amount tendered under a *ca. sa.* It would be a gross injustice if the rule were granted.

Mr. Justice BYLES and Mr. Justice KEATING were of the same opinion.

Miss Fray wished to be allowed to bring forward further affidavits which would strengthen her case.

This the Court refused to allow.

The CHIEF JUSTICE said he had refrained from interfering or from expressing an opinion in the case because Miss Fray had stated the other day that he ought not to do so, as he had been counsel for fourteen years for the Earl of Zetland. It was unnecessary for him to say that the fact of his having been counsel for the Earl of Zetland in other cases had not had the slightest influence on him in this application; but he felt it right to state that the only feeling on his mind was one of pity and compassion for Miss Fray, and that he regretted much to hear the other day that she was suffering from some disease of the brain.

Miss Fray.—Oh, not now, my lord; I am quite well.

Rule refused.